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Securing Scientific Understanding: Expert Judges in Finnish Environmental Administrative Judicial Review

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Abstract

Finland has opted for an ‘internalized solution’ when it comes to securing courts access to adequate scientific knowledge: in the administrative courts, in-house expert judges are part of the court’s panel. The expert judges have scientific or technical education but no lawyer’s qualifications, yet are considered judges as much as the judicial ones. In the Supreme Administrative Court and in the first court of appeal most, albeit not all, of the environmental cases are heard by panels with expert judges – notably, the cases dealing with nature conservation but not with the Water Act or the Environmental Protection Act are problematic in not receiving such attention. The combination of administrative judicial system of broad scope of review, in-house environmental expert judges and inquisitorial and investigative approach enables thorough consideration of the cases, allowing for an elegant solution to the fundamental epistemological and ontological challenges faced by environmental regulation – namely those of ‘legal questions and scientific answers’. The Finnish solution brings indisputable benefits and as such is recommended to other jurisdictions. Domestically, we suggest that national legislation be amended in order to convene cases dealing with nature conservation matters to the administrative court with expert members as well.

Keywords

Administrative judicial review, administrative environmental law, expert judges, scope of review, scientific knowledge in law

1 INTRODUCTION: EXPERT JUDGES ENGENDERING IN-HOUSE EXPERTISE

When understood broadly as judicial decision-making on matters relating to the environment, environmental litigation has multiple paths. In Finland, some of the cases that could be described as ‘environmental’ belong to the jurisdiction of the general courts – e.g., environmental crimes follow the path of criminal litigation.¹ The vast majority of the cases relating to the environment are, however, dealt within the administrative branch: from the first instance administrative authorities via administrative courts to the Supreme Administrative Court (‘the SAC’). In the trichotomy developed by Amirante, the Finnish system partially exemplifies the category of ‘internal specialization’, in which – instead of relying solely on the general jurisdictions or having separate institutions/structures to deal with environmental matters – ‘green judges’ are vested with the authority to deliberate environmental cases.²

The Finnish administrative judicial procedure is scrutinized here in an attempt to 1) examine the scope (intensity) of review employed in the Finnish administrative judicial process, and 2) study the ways in which Finnish administrative courts acquire and employ the scientific or technical knowledge required for the decision-making they conduct within the boundaries set by the answer to the first question.³ Answering the first question (Chapter 2) describes the context in which the judges operate in Finnish administrative courts and, simultaneously, partially explains the solutions chosen for the second question. In order to provide context, the beginning of the procedural path for the first instance administrative authorities is shortly explained (Chapter 3), as is the Finnish referendary system.

¹ Environmental crimes (impairment of the environment, nature conservation offences, building protection offences, etc.) were included in the Finnish Criminal Code in 1995 as its Chapter 48; later, Chapter 48a was added for natural resources offences (e.g. those regarding hunting and fishing). The English translation of the Criminal Code (rikoslaki 19.12.1889/39) is available at <http://finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (accessed 10 March 2018).

The authors wish to thank Pekka Vihervuori, president of Supreme Administrative Court of Finland until September 2018 and Kari Kuusiniemi president of the same institution from September 2018 on, for their helpful comments while drafting this paper.

² Only ‘partially’ since the judges with judicial training also sit cases other than environmental ones; only the ‘expert judges’ focus solely on environmental matters, thus representing the ‘green judge’ typology. Amirante, Domenico ‘Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India’ (2012) 29(2) *Pace Env'tl. L. Rev.* 441, 446.

³ Comparisons to other jurisdictions are conducted to a limited degree; see the foreword of this Special Issue for an extensive transnational analysis.

The answer to the second part (Chapter 4) is highly dependent on the existence of so-called ‘expert judges’: judges with scientific or technical education and without formal qualifications as lawyers, and how their expertise on environmental issues is put to practice in the courts’ decision-making processes.⁴ The concept ‘expert judge’ is employed here as a general term referring not only to the expert judges in the Vaasa Administrative Court but also the expert members of the Supreme Administrative Court – the differences and similarities between these two concepts are elaborated on in Chapter 4. Vaasa Administrative Court (‘the Vaasa court’, ‘Vaasa’) is significant since appeals on cases applying the Environmental Protection Act (‘the EPA’) or the Water Act (‘the Water Act’) are centralized there.⁵ In such cases, an expert judge must be part of the court’s panel. Environmental regulation in Finland is extensive, ranging from water construction regulation and environmental permitting systems to soil and water abstraction and mining regulations, from habitats and species conservation to land use planning and water management. Not all of these pieces of regulation are examined equally here: the focus is on the procedures (and associated substantial questions) of the EPA and the Water Act, which together form the substantive core of the administrative environmental permitting system and which, as mentioned, denominate cases that are dealt with in the Vaasa court.⁶ Furthermore, an anomaly in current environmental regulation system is explained: some of the cases dealing with nature conservation – i.e. those not concerning the Water Act or the EPA – are not guided to the Vaasa court, i.e. they are not scrutinized by an administrative court panel of both judicial and expert members.⁷

In line with the global discussion of proceduralization of (environmental) law, the administrative judicial system in Finland is a closely-knit entity in which substantive and procedural matters

⁴ In what follows, ‘expertise’ is used to refer to scientific or technical knowledge provided by these expert judges. Here judicial expertise (provided by lawyer or the expert judges present in the court panel) is excluded from the concept, though judicial expertise is in principle comprehended as one form of expertise itself.

⁵ The Environmental Protection Act (ympäristönsuojelulaki 527/2014) has unfortunately not yet been translated into English. However, the English version of the previous act from the year 2000 is available at <<http://finlex.fi/en/laki/kaannokset/2000/en20000086>> (accessed 10 March 2018). The English version of the Finnish Water Act (vesilaki 587/2011) is available at <<http://finlex.fi/en/laki/kaannokset/2011/en20110587>> (accessed 10 March 2018).

⁶ Some pivotal parts of environmental law (e.g., building and land use planning regulations) are excluded from the examination. This does not imply that questions examined here might not also be relevant in those fields – the limitation of scope extracts the most crucial issues of the theme, but, concurrently, precludes all-embracing examination. For the same reason, some significant fields of natural resources regulation, such as mining or forestry regulation, are also omitted. Of those fields, mining undertakings are often, albeit not always, regulated not only by their specific pieces of legislation but also by the EPA and the Water Act (especially with regards to the mining activities occurring after the initial exploration phases).

⁷ The Supreme Administrative Court naturally deals with cases from the whole country, see text at fn 60ff.

influence each other at all levels, from administrative authorizations to their evaluation in the administrative courts.⁸ Towards the concluding discussion, questions on allocation of the cases and impartiality of the judges, issues that an expert judge system unavoidably provokes, are brought to the fore (Chapter 5). The discussion (Chapter 6) concludes the work and considers the benefits of the expert judge solution for environmental adjudication often requiring both judicial and non-judicial expertise, and whether other jurisdictions might have grounds to adopt the Finnish pattern.⁹

Naturally, from some perspectives even the solution in which administrative courts are in the first place allowed to examine the substance of the administrative decision could be considered an infringement of *trias politica*.¹⁰ However, in the European and international legal reality, so stringent an interpretation might result in infringement of a Member State's obligations.¹¹ Even though Finnish environmental regulation implements the same European (and international) environmental

⁸ On the proceduralization in European Union law and environmental law, see e.g. Sabel, Charles F. and Zeitlin, Jonathan 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' *European Law Journal* 14:3 (2008) 271–327; Scott, Joanne 'Flexibility 'Proceduralization' and Environmental Governance in the EU' in Scott, Joanne and De Búrca, Gráinne (eds, 2000) *Constitutional Change in the European Union* (Hart Publishing); Gunningham, Neil 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21 *Journal of Environmental Law* 179; Louka, Elli (2004) *Conflicting Integration: The Environmental Law of the European Union* (Intersentia nv.) 67–73; and specifically in the context of water law, Howarth, William 'Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities' *Journal of Environmental Law* 21:3 (2009), 391, 394–8; Keessen, Andrea M. and others 'European river basin districts: are they swimming in the same implementation pool?' *Journal of Environmental Law* 22:2 (2010), 197.

⁹ Even though the first instance administrative authority is not a court, interpretation of laws occurs there in a manner roughly similar to the courts. The close-knit administrative-legal reality in (environmental) matters does not come without challenges; on the constitutional issues, see e.g. Fisher, Elizabeth *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) and Elliott, Mark *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001).

¹⁰ The judicial review interferes with the executive powers vested with the administration, yielding the constitutional concerns, Mäenpää, Olli 'Judiciary v. Executive: Judicial Review and the Exercise of Executive Power' (2017) 2–4 *JFT* 242, 248, 250. The English model is a notorious example of a system in which judicial review may interfere only with questions considered strictly legal, and the substance of administrative decisions or rules are considered as political, i.e. falling out of the scope of judicial review, Cane, Peter 'Understanding judicial review and its impact' in Hertogh, Marc and Halliday, Simon (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press 2004), 15, 17–8, 21–3. The Irish variation, with a comparable point of departure, is explained in Áine Ryall's article 'Enforcing the Environmental Impact Assessment Directive in Ireland: The Evolution of the Standard of Judicial Review' in (2018) *Transnational Environmental Law* (forthcoming). See also text at fn 22ff.

¹¹ See Mariolina Eliantonio's article 'The EU requirements for the standard of review and for the duty of national courts to access scientific knowledge in environmental litigation: a story of moving targets and vague guidance' in this Special Issue.

law as all the Member States, the Finnish model for acquiring scientific knowledge from specific expert judges is, globally speaking, unusual. Its greatest benefit is that when the judges' panel deliberates the case, the scientific expertise is present in the discussion, formulating the case and the scientific realities it entails – the questions asked are formulated not only by the lawyer but also by the expert judges.¹²

From 2011 on, India has also had in-house expert judges on its National Green Tribunals ('the NGT'). In the Indian context, the characteristics of in-house expert judges and judicial judges are similar to those of the Finnish solution: 'the scientific experts with environmental knowledge work alongside legally qualified judges as collective environmental decision makers of homologous standing'.¹³ The system used in Finland is, however, deeply rooted in history: the arrangement was already in place in the era when Finland existed not as a nation but only as the eastern regions of Sweden. Contemporary Sweden has also kept the arrangement of 'expert judges' to date (although the court systems differ organizationally).¹⁴ The modern-day Swedish and Finnish systems are still greatly similar: in Sweden as well the expert judges are part of the court panel in both administrative courts and the supreme administrative court when these deal with cases considered 'environmental', as the commentary piece by a Swedish expert judge right after this article serves well to illustrate.¹⁵

¹² This advantage is returned to in more detail in the discussion (Chapter 6), see text at fn(97)ff.

¹³ In India, scientific experts have a central role in the environmental tribunal's normative structure, Gill, Gitanjali Nain 'Environmental Justice in India: The National Green Tribunal and Expert Members' (2016) 5(1) *Transnational Environmental Law* 175, 177, 183, 186. See also Amirante (n 2).

¹⁴ For centuries, the region of Finland was part of Sweden and this tie was interrupted only in 1809, when Russia conquered the eastern regions of Sweden. Russia declared the area a grand duchy of its empire, albeit allowing it to maintain much of its autonomy, including but not limited to the existing (i.e. Swedish) administrative system. Following the turbulence of the Russian Civil War, Finland declared its independence in 1917 and continued to foster its originally Swedish administrative and legal traditions. Of the historical developments see e.g. Vihervuori, Pekka 'Private and public ownership of water areas—structures and implications of the Finnish model' in Hollo, Erkki J. (ed) *Water Resources Management and the Law* (Edward Elgar Publishing 2017), 98, 102–6, Tegner Anker, Helle and others 'The Role of Courts in Environmental Law—A Nordic Comparative Study' (2009) *Nordic Environmental Law Journal* 9, 11, 16, available online at <<http://nordiskmiljoratt.se/onewebmedia/NMT-202009.pdf>> (accessed 10 March 2018).

¹⁵ Svedberg, Rolf 'Natural Sciences in Environmental Law' in this Special Issue. Sweden has five *Mark- och miljödomstolar* ('Land and Environment Court') that deal with environmental matters, either as the first instance or after an appeal from municipal or administrative level, and one *Mark- och miljööverdomstolen* ('The Supreme Land and Environment Court'). The cases examined in this branch include a broad range of issues considered 'environmental': from environmental and water law via land use and building, expropriation to health, nature conservation etc. Specifically on the Swedish system, see Tegner Anker and others (n 14) 13–5 Fig. 4.

The expert judge solution may have been inspired by the fact that Sweden was a relatively vast and scarcely populated kingdom. In such a geographic and demographic situation, expertise of any kind was in short supply and having it all on hand in the court panel – and, concurrently, blurring the dividing line between different forms of expertise – may have simply been a practical solution. This is, however, mere speculation: to our knowledge this interesting question has not been specifically addressed in academic research.¹⁶

2 THE WIDTH AND DEPTH OF THE SCOPE OF REVIEW

Before embarking on the substantive side of administrative judicial review in the key environmental matters, first the general question of scope (intensity) of review is discussed. Understanding how legality review and principle of judicial investigation are comprehended in Finland is not only interesting as such but it also establishes the frame of reference for the second question presented here, the acquisition and employment of scientific expertise entailed in the work of the administrative courts.

2.1. Reviewing Legality

Similarly to its German or Swedish counterparts, Finnish administrative courts are understood to be like the general courts: their task is to review the first instance administrative authorizations and they are not part of the administration itself, unlike the case in e.g. France.¹⁷ However, unlike in

The Swedish system is included in analysis by Pring, George and Pring, Catherine 'Greening Justice, Creating and Improving Environmental Courts and Tribunals' (The Access Initiative 2009), available online at <<https://www.eufje.org/images/DocDivers/Rapport%20Pring.pdf>> (accessed 10 March 2018). It must be noted that on pages 56 and 59 they give slightly misguided information on the Finnish system. Finnish administrative courts do not rely solely on external institutions for technical knowledge but also on in-house expert judges as described here. Thus classing the Netherlands and Finland in the same category is incorrect; see also Backes, Chris 'Organizing Technical Knowledge in Environmental and Planning Law Disputes in the Netherlands—the Foundation for Advising the Administrative Judiciary' in and the foreword of this Special Issue. Regarding the internal and external sources of expertise available for Finnish administrative courts on environmental matters see text at fn(73)ff.

¹⁶ Earlier in history, from 1215 on, the lack of educated lawyers explained the emergence of laymen in courts in Scandinavia (whereas adequate numbers of lawyers and centralized government explain the solutions opted for in the continental Europe and European common law tradition), Pihlajamäki, Heikki 'Länsimaisen maallikkotuomarin kolme mallia: Common law, Manner-Eurooppa ja Skandinavia (The Three Variations of Western Lay Judges: Common Law, Continental Europe and Scandinavia)' (2013) 4 Lakimies 583, 592–3.

¹⁷ Comparison of the two systems from the Finnish perspective, Kanninen, Heikki "Juger l'administration, c'est encore administrer" –maksimi nykyajan hallintolainkäytön valossa' in *Avoim, tehokas ja riippumaton. Olli Mäenpää 60 vuotta juhla kirja* (Edita 2010) 217, 219, 227.

Germany, the Finnish and Swedish peculiarity is the broad scope (or depth) of review the administrative courts entail in their deliberation. As *Vihervuori* summarizes:

”The prime concern of administrative judicial process is *to review legality* of the appealed authorization. Within the limits of the appeal the scope of review is similar to that in the administrative authority. For example, the substance matter is issuance of the building permit, not only the legal or factual question underpinning it.”¹⁸

In other words, the scope of review extends to all the relevant matters of which the authorization or permit consists. The examination is active and the only restriction comes from the appeal: the courts cannot exceed the request or demand.¹⁹ This broad scope of review, coupled with often-flexible environmental norms and principles, grants the courts latitude in their deliberations, partly enabled by the expert judges present in the discussions. However, it is worth bearing in mind that the width of review is contingent on the substantive legislation: consideration in cases dealing with the EPA is often more limited than in cases dealing with the Water Act. Also, long tradition in judicial practice in the courts has settled many disputes, narrowing down the marginal of judicial review.²⁰ The general guideline of restraint in dealing with straightforward policy issues is also retained in the judicial review of environmental matters.²¹

It is interesting that in the Finnish context *legality* is understood relatively broadly. The reality it furthers is not foreign to (environmental) administrative judicial review in the global context: the Indian NGTs are competent to decide upon a broad range of ‘questions of law and fact’, to the extent

¹⁸ Translation and emphasis here by the authors. Vihervuori, Pekka ‘Totuudesta hallintolainkäytössä (Truth in Judicial Review of Administrative Action)’ in *Juhlajulkaisu Pekka Hallberg 1944 –12/6 – 2004* (Suomalainen lakimiesyhdistys 2004) 496.

¹⁹ Mattila, Jukka ‘Oikeudenmukainen oikeudenkäynti hallintotuomioistuimessa’ in *Korkein hallinto-oikeus 90 vuotta* (Otavan Kirjapaino 2008) 278, 284.

²⁰ The difference is rooted in the manner in which consideration is guided in the said acts: the Water Act 3:4 allows for balancing of interests whereas the EPA 48 § does not. The relatively long history of the Water Act and its national importance make it an interesting example of how broad and flexible norms become firmer although the phrasing of the norms remains intact—on the Water Act see Vihervuori (n 14) 98, 112–5.

²¹ As found by Olli Mäenpää, ‘Courts should show reticence in other issues that are not directly connected to the evaluation of legality. Policy issues and the actual exercise of executive power are especially considered to limit judicial review’ in Mäenpää (n 10) 250. He is, however, quick to admit that the dividing line between accepted consideration and administrative policy may be difficult to decipher.

that Gill describes the right to be of ‘wide and overriding’ nature.²² It is good to remember that the SAC may deal with the most difficult cases, in which the legal interpretation is far from clear. (Albeit it was only in 2018 that the SAC was granted the right to select those environmental cases it wishes to consider; previously the path to the highest level of appeal was open to all, resulting in less complex cases also being dealt with in the SAC.)²³ It is reasonable that in deciding upon such matters, the intensity of review is not unnecessarily constrained, but the court is granted latitude in its consideration. Previously an established interpretation of *trias politica* might have been influential in this concern: if the decision depended mainly on the expediency consideration (on the reasonableness of the decision or discretion; in other words, not mainly on judicial considerations), the SAC ought to have referred the case in that regard to the Council of State.²⁴ The 21st century witnessed no cases being referred to the Council of State, and even in the second half of the 1990s the number of cases referred declined from 0,5 % to 0,1 %, yielding speculations that the section would simply be removed in the *travaux préparatoires* of the 2006 amendment – however, the section was left intact.²⁵ The development was, however, incessant, and thus even though ‘[t]he fact that a principle is not respected in the everyday operations of the courts does not necessarily imply that the principle itself has passed into *desuetude*,’ as Minkkinen duly notes²⁶, this section was *desuetude* before finally

²² Even the principle of *ex debito justitiae* (in the interests of justice) is employed, which gives grounds to consider the scope of review in the NGT’s to be even wider than that of the Finnish administrative courts (in environmental matters), Gill (n 13) 187. Then again e.g. the English would shrink from the Finnish understanding of legality, so limited is their judicial review, Cane (n 10) 18, 21; also the ‘unreasonableness’ or ‘irrationality’ demanded in the Irish system in order to embark on merit’s review is also relevantly more limited, Ryall (n 10). Then again the Australian model of evaluating the merits of the decision to find out whether it is the ‘correct or preferable one’ and whether the *quality* of decision is adequate, resembles the Finnish option, Ky, Patrick ‘Qualifications, Weight of Opinion, Peer Review and Methodology: A Framework for Understanding the Evaluation of Science in Merits Review’ (2012) 24(2) Journal of Environmental Law 207, 214–5.

²³ Collection of statutes 974–978/2017 (accepted 19 December 2017, in force 1 January 2018), Government’s Proposal 43/217 (HE 43/217). The proposal was jointly prepared by the Ministry of the Environment and the Ministry of Justice.

²⁴ The Council of State i.e. the Government (the highest executive body). Supreme Administrative Court Act 2 § in its previous form (1265/2006), substantially unchanged from the original version from 1918. Tegner Anker and others (n 14) 17.

²⁵ Mäenpää, Olli ‘Tarkoituksenmukaisuus—vallanjaon rajapyykki?’ in Hurri, Samuli *Demokraattisen oikeuden ehdot* (Tutkijaliitto 2008) 137, 139–41, fn 1; see also Minkkinen, Panu ‘”Vähiten vaarallinen valtioelin”? — Tuomiovalta, vallanjako ja demokratia (“The least dangerous branch”? – Judicial power, the separation of powers, and democracy)’ (2016) *Politiikka* 58(3) 224, and for an all-embracing analysis of the *trias politica*’s critical points in Finnish constitutional life, Tuori, Kaarlo ‘Vallanjako—vaiettu oppi’ (2005) *Lakimies* 7–8, 1021–1049.

²⁶ Minkkinen, Panu ‘If Taken in Earnest’: Criminal Law Doctrine and the Last Resort’ (2006) *The Howard Journal* 45(5) 521, 530; seconded by Mäenpää (n 17) 121.

being removed in the most recent amendment, which took effect in 2016.²⁷ In the international context the Finnish solution is somewhere in between the models adopted in the USA and in Germany, but closer to the latter.²⁸

Comprehension of legality aside, some procedural limitations apply, irrespective of the changes made to the referring clause: the courts must not exceed the parties' claims (*ultra petita*) and the court's territorial jurisdiction must be considered *ex officio*.²⁹ Also, in the Finnish system the courts have wider options than those of annulment or injunction but they can also amend the permit and its conditions. However, if the permit holder seeks more lenient permit conditions as the only appellant, the interpretation of the *reformatio in peius* principle obliges the courts not to repeal the permit even if they considered that the project should have not been allowed in the first place. (In such cases neither is tightening the permit conditions allowed.) The case is naturally different in the vast majority of the cases in which environmental NGO's or other parties also appeal the authorization, when even contradictory demands further broaden the possibilities for the appeal authority in their task. In cases with multiple appellants the court can have rather broad scope of review.³⁰

²⁷ Amendment enacted with statute 892/2015, initiated with the Government's Proposal 230/2014 (HE 230/2014), deleted the notion from the Act. The development towards becoming *desuetude* had been so consistent in the 20th century it was even slightly surprising that the stance regained formal awakening in the 2006 amendment, Mäenpää (n 18) 121. However, there were good reasons behind such a choice: retaining the section emphasized that in principle the questions of expediency were not to be examined in the judicial process; only exceptionally could such a claim be examined in courts who, with such a case at hand, were ordered to refer it to the Council of State, Mäenpää (n 25) 141–2 (grounding such a reasoning to the original preparatory works from 1917).

²⁸ Mäenpää (n 25) 145.

²⁹ Mäenpää, Olli, *Hallintoprosessioikeus (Judicial Procedure in Administrative Courts)* (2nd edition, WSOYpro 2007), 89. Understanding of *ultra peius* is similar in the French tradition, Kanninen (n 17) 224–5. In the Granö Case the Vaasa court has even repealed a decision by the CEDTE (the surveilling authority, 'Centre for Economic Development, Transport, and the Environment') on a nature conservation matter when the CEDTE had not had territorial jurisdiction due to a recent change, even though the matter had not been considered in the appeal. The Court remitted the case to the correct CEDTE. Vaasa Administrative Court Decision 24 February 2016 N:o 16/0084/1.

³⁰ Mäenpää (n 29) 502, Pärnänen, Sinikka *Vesistöjen ennallistaminen uiton jälkeen* (Suomalainen Lakimiesyhdistys 2012) 118, referring to Mäenpää, Olli *Hallintolupa* (Lakimiesliiton kustannus 1992) 211, 339. Also in Australia the understanding of merit's review the court may vary the decision but the option of making a substitute decision is not available to the Finnish administrative courts who, be such the situation, must remit the case back to the first instance authority, Ky (n 22) 215.

According to the Vaasa court's records from 2014–17 the largest and most influential (albeit naturally not the only) Finnish environmental NGO (The Finnish Association for Nature Conservation, 'the FANC') or its regional associations have appealed on 123 first instance administration's decisions of which 83 dealt with the EPA (of which 38 were cases on the peat production, 10 on mining and 10 on nature conservation) and only 6

2.2 Principle Of Judicial Investigation

As with scope of review, the interpretation and usage of the principle of judicial investigation is comprehensive in Finnish administrative courts, serving also the needs of gathering of scientific knowledge to equip the decision-making. According to the Administrative Judicial Procedure Act, the appellate authority must make sure that the matter is thoroughly examined and, if the case requires, ask for further clarification from the first instance administrative authority or the parties. The appellate authority must on its own initiative investigate the matter to the extent that impartiality, fairness, or the nature of the case necessitate.³¹ Even though the concept of ‘evidence’ is used in the Act, in environmental cases concepts of examination, investigation or reporting are preferred to avoid connotations with evidence or proof: the classical legal concepts that stem from criminal law are not always best at illustrating deliberation on environmental matters, neither in the courts nor in the administrative authority.³² The two aspects are interlinked: the administrative authority is allowed to make regulatory and unilateral decisions, thus reviewing them in the courts is different from other situations.³³ All information in any reports or documents available is required for the basic inquiry of the case; their role is more extensive than is the case in traditional evaluation of evidence.³⁴

The principle of judicial investigation is interpreted similarly in the first instance administrative authority and the administrative courts. The obligation of impartiality applies to both.³⁵ However, this emphasis on the administrations’ active role is not meant to imply that administrative authorities and administrative courts are conceptually or organizationally merged in Finland, or that the latter is considered as an extension of the former. Earlier, this might have been the case, but recent decades

land use and planning. One may deduct that the FANC is an active participant in the environmental matters, especially when bearing in mind that not all cases are centralized to Vaasa, text at fn(67)ff.

³¹ Administrative Judicial Procedure Act 31 and 33 §, Mäenpää (n 29) 355–9, Mäenpää (n 10) 252.

³² Vihervuori (n 18) 500, Mäenpää (n 10) 242–3. This is also specifically noted in the Australian context, in which the tribunal dealing with environmental matter is explicitly ‘not bound by the rules of evidence’, Ky (n 22) 216.

³³ Mäenpää (n 10) 243, 245.

³⁴ Vihervuori (n 18) 504, see Chapter 3 on the first instance administrative authorities in general.

³⁵ Administrative Judicial Procedure Act 33 §, Administrative Procedure Act (hallintolaki 434/2003) 31 § and 32 §, legally non-binding English translation available at <<http://finlex.fi/en/laki/kaannokset/2003/en20030434.pdf>> (accessed 10 March 2018).

have witnessed reassuring developments in both the organizational arrangements and in the judges' self-understanding.³⁶

The forward-looking nature of environmental matters and emphasis on scientific knowledge characterize the investigation and active role of the courts, and are also relevant when it comes to acquiring the necessary expertise.³⁷ In environmental cases, several parties and stakeholders are typically present, the hearing of whom is part of the procedure. Participatory rights are secured according to the obligations of the Århus Convention and environmental NGO's have actively employed their right to participate, including their right to appeal the authorizations.³⁸ Interestingly it has been evaluated that the type of inquisitorial procedure in use in Finland may encourage appeals from private parties or environmental NGO's.³⁹ As is common in administrative cases in general, party relationships in environmental matters are more complex than in standard civil or criminal litigation. Even when the multiple relations and even conflicting interests were in general properly managed, the role of the first instance administrative authority in the subsequent procedure is somewhat equivocal.⁴⁰ The courts are obliged to obtain a statement from the administrative authority but otherwise the authorities are not considered a party. The situation is confusing and a committee considering the developmental needs of the court system has pointed it out as one aspect in need of clarification.⁴¹

³⁶ Mäenpää, Olli 'Hallintoprosessi – hallinnon valvontaa vai oikeuksien turvaa? (Administrative Judicial Procedure – Supervising the Administration or Securing Individual's Rights?)' (2007) 3 Oikeus 325, 330.

³⁷ Vihervuori (n 18) 506–7.

³⁸ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), done at Aarhus, Denmark on 25 June 1998. Finland has been part of the Aarhus Convention since 2004. At times the manner in which eNGO's place appeals may appear as a way to challenge nationally accepted but internationally and scientifically contested practices. This is the case with e.g. environmental permits for peat production in which peat is excavated from the wetlands and used as an energy source, Pärnänen (n 30) 126. The internationally accepted scientific stance on the matter is that practice extremely harmful in combating climate change: 'Drainage of wetlands is associated with potentially large carbon losses as organic matter that has accumulated slowly over centuries to millennia is oxidized' in IPCC Special Reports *Land Use, Land-Use Change Change and Forestry*, 4.4.6 Wetlands Management (eds Robert T. Watson, Ian R. Noble, Bert Bolin, N. H. Ravindranath, David J. Verardo and David J. Dokken, Cambridge University Press 2000), available online at <http://www.ipcc.ch/ipccreports/sres/land_use/index.php?idp=196> (accessed 10 March 2018).

³⁹ Tegner Anker et al (n 14) 16.

⁴⁰ Vihervuori, Pekka 'Ympäristö-, vesitalous- ja luonnonsuojeluasiat' in *Korkein hallinto-oikeus 90 vuotta* (Otavan Kirjapaino 2008), 493, 497.

⁴¹ Administrative Judicial Procedure Act 36 §, Memorandum of the Committee on the Development of Court System 2003 (tuomioistuinlaitoksen kehittämiskomitean mietintö KM 2003:3), 23, 85.

Even when the courts actively investigate the case, the main responsibility to obtain the necessary information lies with the parties: the authority or the court merely instructs them or suggests what piece of information is desired for the decision-making. Even though the party is not obliged to ‘establish the evidence’ in favour of their case, it is in their interest to provide the authority or court with all the information they consider necessary for the decision to favour their stance. In certain cases this responsibility is detailed in pieces of legislation, as is the case with the EPA and the Environmental Protection Decree, which include detailed lists of information that the operator must deliver in order to have their project considered.⁴²

Thus the principle of judicial investigation obliges the courts and administrative authorities to perform inclusive, even holistic, procedures in order to examine and discern the matter as thoroughly as necessary. In this the outcome resembles that of the Indian NGTs, in which the broad powers and diverse expertise available support investigative and inquisitorial procedure, not to mention the fact that there the proactive Supreme Court and the judiciary in general were the protagonists of the NGT’s emergence in the first place.⁴³ In Finland the prohibition of decisions *contra legem* acts, along with the above-mentioned prerequisites, as the ultimate line not to be crossed, but within these limits the scope of judicial review is broad.⁴⁴ In practice, since the judiciary is trusted to deliberate without many external constraints, comprehensive use of scientific knowledge is possible, especially when that knowledge is readily available in the courts themselves. This is also a two-way street: Tegner Anker and others have speculated that ‘[t]he court’s attitude towards a restricted or a full review may be partly dependent on their knowledge of the substantive issues’ – in other words, the presence of in-house expert judges might even influence the court’s interpretation of its own scope of review.⁴⁵ From these substantial considerations we now move on to more procedural parts, the manners in which scientific knowledge can be obtained.

3 FIRST INSTANCE ADMINISTRATIVE AUTHORITIES: PERMITS AND SURVEILLANCE

⁴² The EPA 39 1, the Environmental Protection Decree (Valtioneuvoston asetus ympäristönsuojelusta 713/2014) Chapter 2 (3–10 §).

⁴³ Gill (n 13) 185, 187, Amirante (n 2) 454–5.

⁴⁴ Koulu, Risto *Lainkäyttöä vai hallintolainkäyttöä* (Lakimiesliiton Kustannus 2012) 187.

⁴⁵ Tegner Anker and others (n 14) 17. It must nonetheless be acknowledged that during the 1990s, when the Supreme Administrative Court gradually ceased to refer cases to the Government, there were no changes in the SAC’s organizational structure regarding the expert judges, see text at fns(24–28).

A glance is now taken at the Finnish first instance administrative authorities in order first, to explain the understanding of administration's role in Finland and second, to outline the procedural path of environmental matters before they enter the courts.

In principle, the first instance administrative authorities exist to protect the general interest: they are to exercise administrative authority but not possess it. That is why legality, impartiality, and objectivity are of such significance in the administrative work: they are understood as elements of substantial equality, as opposed to its formal counterpart.⁴⁶ The administration of environmental matters adheres to these principles and thus the outcome that is reviewed in courts ought to be as impartial and objective as possible.

In practice the Finnish first-tier environmental administration includes both issuing the administrative authorizations and their surveillance. The former includes both environmental permits that the operator must apply for and the registration procedure available for lesser activities: the authority, either the Regional State Administrative Authority ('the RSAA') or municipalities, may then accept them as applied or issued, decline them or accept them with certain conditions.⁴⁷ The supervision of the permitted activity is mainly conducted by a separate authority called the Centre for Economic Development, Transport, and the Environment ('the CEDTE').⁴⁸ Even though the supervision is based on the operator's self-surveillance, since 2014 in cases dealing with the EPA the supervisor has had more detailed scope of inspection to better intervene during 'practice as usual' and in cases of exceptional circumstances. The supervisor's ultimate tool is administrative compulsion, even to the extent of suspending operations (not frequently used option).⁴⁹ The state regional administration will most likely be completely transformed in the coming years, giving the country new regional environmental authorities yet again.⁵⁰

⁴⁶ Mäenpää (n 10) 252, Mäenpää (n 29) 355–416.

⁴⁷ The registration is regulated in the EPA Chapter 12 and the activities requiring registration are detailed in the EPA's Annex 2. Four of the six RSAA's deal with environmental matters.

⁴⁸ Even though the environmental units in the CEDTE's are mainly concerned with supervision in some nature conservation matters, they are the decision-making authority. Also the CEDTE's have specialized in certain subject matters.

⁴⁹ Supervision and administrative enforcement is regulated in the Water Act Chapter 14 and in the EPA 167–189 §.

⁵⁰ Both the RSAA's and CEDTE's are in their current form relatively new institutions. However, Finland's health care, social services and regional administration system is facing extensive transformation under current Prime Minister Sipilä's government. The details of the upcoming changes are yet to be confirmed at

Finnish communities have traditionally enjoyed a strong and independent position, as seen in environmental matters, where municipalities are bestowed with administrative authority in some lesser activities with environmental impacts. Since the country of 5,5 million inhabitants consists of 311 municipalities, most of them are small in size. This results in collaboration among municipalities in fulfilling their obligations, including ones concerning the environment. The collaboration naturally enhances the (amount of) expertise at hand during permit preparations. This is increasingly beneficial when the decision-making itself occurs in politically-elected municipal boards, which may not contain much expertise on environmental matters.⁵¹ The rectification process is commonplace when the decision-making authority is located in the municipalities. However, administrative courts are the usual appeal authority in environmental matters: access to them is largely unconstrained and widely available, though minor exceptions naturally exist. In the municipalities and the RSAA's the extent of available scientific—and legal—expertise varies greatly. In the largest municipal collaboration units or RSAA's, the personnel may have diverse scientific backgrounds and several lawyers may be available, whereas in smaller units only a few persons with no legal training share the workload. Thus, if appealed, the cases brought to the administrative courts may be diverse in quality and in the width of the scrutiny employed.

4 APPEALS TO THE ADMINISTRATIVE COURTS

With this rudimentary knowledge of Finnish administrative system in environmental matters, we are guided by the key institutions: the administrative courts. Appeals in administrative judicial matters come in different categories, among which municipal appeals and administrative appeals are pivotal (but difference of which has no significance in our examination). Environmental matters are mainly treated as administrative appeals even when the first instance administrative authority is located in the municipality. Before going in detail on their access to scientific expertise, a short glance is taken at the general procedure in which the cases are heard at the courts.

In Finland, both in administration and in administrative courts, a referendary prepares the case for decision. Referendaries are court officials like the judges and are present during the deliberations. They are allowed to participate but do not have the right to vote, should there be a disagreement that is solved by voting. The system is rooted in the Finnish Constitution, which includes sections on the

the time of writing, despite the fact that the new administration is planned to go into operation in January 2020.

⁵¹ The Municipality Act (kunnallislaki 410/2015) 30 § and Chapter 10 on elected officials, 69–86 §.

referendaries and their right to give a dissenting opinion on the decision, liberating them from official responsibility.⁵² Even though the titles are similar to those e.g. in the Court of Justice of the European Union ('the CJEU'), the work of a Finnish referendary differs from that of their European counterpart, especially in the independence of their position as civil servants.⁵³ This secures the liberty of their position.⁵⁴ However, independence of position does not imply independence from the judges: the referendary in Finland is not considered to be independent in that regard, as is e.g. the Advocate General in the CJEU. In Finland the preparation of the case is understood more as an internal process of the court or authority, entwined with the overall procedure.⁵⁵ The referendary and the preparatory work are integrated parts of the court's (or authority's) proceedings. The persons holding the position perform their work independently but the outcome is for the institution's internal use only. Interestingly, there has been no discussion that the referendary's stance ought to be made public to the parties before the main hearing, so strongly is the referendary's work considered to be part of the court deliberations (in contrast to the solution chosen in the CJEU). The system is intertwined also in the sense that a judge can also work as a referendary and present the case for the hearing but only in the administrative courts, not in the SAC.⁵⁶

4.1 Call The Experts...

⁵² Constitution of Finland 118.2 §.

⁵³ This makes the referendaries independent of the opinion of the judge or judges whom they serve: their appointment or further career is not bound to their opinion, Kanninen, Heikki, 'KHO:n esittelijä ja EY:n tuomioistuimen lakimiesavustaja – sama työ, eri asema' in *Korkein hallinto-oikeus 90 vuotta* (Otavan Kirjapaino 2008) 577, 585, 589–95. The referendary system is thus strongly linked to the Finnish understanding of the responsibility of an official for the legality of their actions, established in the Constitution of Finland 118 §. See also Mäenpää, Olli *Hallintolaki ja hyvän hallinnon takeet* (5th ed, Edita 2016).

⁵⁴ Liberty of a position does not, however, render redundant discussion of the acceptability of the system in which persons other than judges are also present in the court's deliberations or hearing, as has been witnessed in the European contexts. In the case *Kress v France* App no 39594/98 (ECHR, 7 June 2001) the European Court of Human Rights ('the ECHR') considered the participation of a *commissaire du gouvernement* in the hearings to be an infringement of the Article 6 of European Convention of Human Rights (a stance reiterated in a subsequent case *Martinie v France* App no 58675/00 [ECHR, 12 April 2006]). Also the role of the Advocate General in the CJEU has been discussed in the Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-665, where at paras 11–12 the AG's were considered to have the same status as judges and be acceptable in this regard; see also Ritter, Cyril 'A New Look at the Role and Impact of Advocates-General—Collectively and Individually' (2006) 12 Colum. J. Eur. L. 751, 756–7, Kanninen, Heikki 'Den kontradiktoriska principen och EG-domstolens generaladvokat' (2001) JFT 6 619–31.

⁵⁵ See also text at fn(66)ff.

⁵⁶ The Court Act (tuomioistuinlaki 673/2016) 9:3.

Finland has six administrative courts, each with a jurisdiction of their own. As noted earlier, appeals on cases applying the EPA or the Water Act are centralized to the Vaasa Administrative Court.⁵⁷ In such cases, an expert judge must be part of the court's panel. Expert judges are experts on scientific or technical matters and their appointment and position is equal to the court's lawyer judges, with the one exception that only a lawyer can be a panel chair.⁵⁸ They work full time, in-house, and have been appointed permanently (by the president of the country), and all the regulations on judges apply equally to both types of judges. Before taking their position in court, most expert judges have gained experience in e.g. administration, research, or industry.

The opportunity to gain from the expert judges' experience is considered a benefit of the distinction between the Vaasa court and other administrative courts. Considerations that the differentiation enables better alignment of case law on certain matters have been presented.⁵⁹ However, the procedures on different substance matters might evolve too dissimilarly, obstructing the parties' or their advocates' abilities to deal with the appeal. Regionalization would decrease the physical distance of the applicant and the court, which is important in the case of oral hearings and especially on-site inspections. Oral hearings are however almost non-existent in environmental matters, a point in favour of the current arrangement.⁶⁰

The SAC is the court of final appeal on administrative matters. Previously, leave to appeal in environmental matters was not generally demanded, but as of January 1, 2018 the legislation was amended and leave to appeal is now demanded in matters concerning environmental protection,

⁵⁷ Text at fn 5. It is noteworthy that even though here the focus is on the Vaasa court, many matters concerning the environment are adjudged in the regional administrative courts.

⁵⁸ Since the expert judges are full time 'in-house' experts, the benefits from their knowledge are not restricted to the court panel deliberation only but also cover informal discussions during the preparations. The Vaasa court has eight permanent expert judges and currently two temporary ones.

⁵⁹ Distribution of Tasks Between the Administrative Courts. Memorandum of the Administrative Judicial Procedure's Grade Working Group, Ministry of Justice, 23 November 2010. ('The Distribution of Tasks Memo', Tehtävien jako hallintotuomioistuinten kesken. Hallintolainkäytön tasotyöryhmän mietintö. 23.11.2010. Oikeusministeriön mietintöjä ja lausuntoja 78/2010) 85, 93. The topic in general was until now last time discussed in the Distribution of Tasks Memo. Since after that the preparatory works of different laws relating to administrative judicial system have not shown signs of reconsidering the solution, it might be seen as the legislator's stance that expert judges are needed in certain case groups.

⁶⁰ E.g. according to the court's records in 2016 the Vaasa administrative court had 1,048 pending cases on environmental, land use and planning matters on December 2016. During 2016 on-site inspections were held in 6 of those cases but oral hearings in none. (In total there were 21 oral hearings, all in cases dealing with social services and health care.)

waters use, soil excavation or land use and building.⁶¹ The SAC's decisions, published on their website, have at times been treated as precedents although formally their position is not that of a precedent (Finland has witnessed long and intense debate on whether the SAC gives precedents or not).⁶² The newest reform concerning leave to appeal may yield change when the SAC becomes entitled to choose which cases it takes upon consideration and may, if it wishes, choose the ones with most value as precedents. Time will tell the effects of this novel amendment.

When cases dealing with the EPA or the Water Act are adjudicated, the panel consists of five lawyer judges and two expert members—in other words cases that in Vaasa court are decided with expert judges, are in the SAC adjudged with expert members.⁶³ Unlike in Vaasa court, the SAC's expert

⁶¹ Collection of statutes 974–978/2017 (accepted 19 December 2017, in force 1 January 2018), Government's Proposal 43/217 (HE 43/217). The proposal was jointly prepared by the Ministry of the Environment and the Ministry of Justice.

⁶² The SAC also publishes short summaries of its decisions but those have lesser value, even though they may guide administrative and legal practice. Annually, some hundred decisions find their way to the annals, and another hundred are summarized on the webpage.

For a glimpse of the discussion see e.g. Siltala, Raimo *A theory of precedent: From Analytical Positivism to a Post-analytical Philosophy of Law* (Hart 2000) and 'Prejudikaateista ja tuomarin prejudikaatti-ideologiasta' (1999) 5 *Lakimies* 674–691 — a critique to Siltala's understanding is offered by Sajama, Seppo 'Raimo Siltalan prejudikaattiteoria' in Esa Kolehmainen (ed) *Oikeus ja kritiikki I* (Forum Iuris 2009) 197–218. Sajama, Seppo 'Prejudikaatit oikeuden kehityksessä' in Tolvanen, Matti and Svensk, Niko (eds) *Vero ja finanssi. Juhlakirja Matti Myrsky 60 vuotta*. (Edita Publishing Oy 2013) 285–304; Myrsky, Matti *Ennakkopäätökset verotuksessa* (Alma Talent 3rd ed 2011); On whether voting influences the value of a SAC precedent, Sutela, Mika, Tarukannel, Veijo and Tolvanen, Matti 'Ennakkopäätökset ja äänestäminen: empiirinen analyysi tuomareiden eriävien mielipiteiden esittämisestä korkeimmassa hallinto-oikeudessa' (2014) 5 *Lakimies* 719, 730–2; and the most recent input analysing the question in the context of water law, Hepola, Matti 'Oikeuskäytännön tulkinnasta kalatalousvelvoitteita muutettaessa (Interpretations of case law when changing fish restocking obligations)' in Määttä, Tapio (ed) *Ympäristöpolitiikan ja -oikeuden vuosikirja* (Itä-Suomen yliopisto 2017) 11–88.

It could be summarized that formally speaking the SAC does not give precedents but in practise the published decisions are closely followed and examined. Hence there is room to debate but the practitioners may find the matter to be less complicated. This interpretation is openly expressed in the context of Finnish Supreme Court: in their public webpage judge Mikko Tulokas expresses a similar stance in a blog-type entry entitled, 'Korkeimman oikeuden tuomioiden prejudikaattimerkitys ja tuomioiden perustelut', Chapter 5, available online in Finnish at

<http://korkeinoikeus.fi/fi/index/muutoksenhakijalle/korkeimmanoikeudentuomioidenprejudikaattimerkitysja_tuomioidenperustelut.html> (accessed 10 March 2018).

⁶³ The SAC also has other expert members participating in deliberations on cases concerning certain intellectual property rights. Expert judges take part in the decision-making when child welfare or mental health issues are decided upon in administrative courts but not longer when and if these cases are taken to the SAC, Kuusiniemi, Kari 'Domstolarna och experterna: Hur trygga sakkunskapen i miljömål?' in Gipperth,

members are part-time and are appointed for a five-year term, often holding university professorships as their chief occupation. Their right to maintain their position is protected as much as the judges' is, and so is their independence in their post.⁶⁴ Temporarily appointed expert members provide diverse and up-to-date expertise to the SAC, and when the expert members work only part-time the pool from which they are chosen is broad, enabling more leeway in finding the expert who best fulfils the requirements of the pending case.⁶⁵ Due to their extensive scientific education they are considered capable of having a say on matters beyond their specific scientific field, thus being of aid with the paralegal material almost inevitably encompassed in the environmental matters.⁶⁶

4.2 ...But Don't, If Nature Conservation Is At Stake

In Finland the European Union Species and Habitats Protection is mainly implemented through the Nature Conservation Act ('the NCA').⁶⁷ The CEDTE is responsible for e.g. establishing nature conservation areas and issuing derogations from species protection. In order to enhance its effectiveness and use of expertise, the authority of the CEDTE's is in some cases centralized: for example, only one CEDTE considers the derogations from habitat protection according to the Habitat Directive's Annex IV(a) and IV(b).⁶⁸ Appeals regarding decisions concerning the NCA are adjudicated in the administrative court with territorial jurisdiction and the court of final appeal is the SAC. Thus the Vaasa court holds no specific position if the pending case deals only with the NCA and has no connection to the EPA or the Water Act, forming the only significant exception to the rule that the 'environmental' cases are centralized to the Vaasa court. Also in cases when the

Lena and Zetterberg, Charlotta (eds) *Miljörättsliga perspektiv och tankevanor* (Iustus Förlag AB 2013) 319, 321.

⁶⁴ Within the five-year term, that is. The Court Act (673/2016) 17:1 and 17:2.

⁶⁵ Vakkilainen, Pertti, 'Asiantuntijajäsenen rooli korkeimmassa hallinto-oikeudessa' in *Korkein hallinto-oikeus 90 vuotta* (Otavan Kirjapaino 2008) 453, 457, 461.

⁶⁶ Kuusiniemi (fn 63) 330–1. Their independent position with regards to the parties of the case must neither be forgotten—in the Indian context the impartiality has been found significant, Gill (n 13) 180–1.

⁶⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206, 22.7.1992, p. 7. However, the protection of certain forest and aquatic habitat types are addressed by Forest Act Chapter 3 (metsälaki 1093/1996, legally non-binding English translation available at <<http://www.finlex.fi/fi/laki/kaannokset/1996/en19961093.pdf>> (accessed 10 March 2018)) and Water Act 2:11 respectively. A legally non-binding English translation of since 2011 not consolidated version of the Nature Conservation Act (luonnonsuojelulaki 1096/1996) is available at <<http://www.finlex.fi/fi/laki/kaannokset/1996/en19961096>> (accessed 10 March 2018).

⁶⁸ Governmental Decree on the CEDTE's 1392/2014 4–17 §. The preparatory works do not mention expertise as a reason for centralization, only 'centralizing resources' is mentioned—'resources' could or could not refer to expertise as well as financial resources, Memorandum of the Decree n:o 1392/2014, 3.

CEDTE's authority is centralized, the appeals administrative court is decided according to the principle of territorial jurisdiction (of the area or municipality in question).⁶⁹

Since the appeals court is chosen on a territorial basis, the expert judges available in Vaasa are not employed in these cases. Thus these cases are deliberated with the scientific knowledge acquired from the parties or the CEDTE in question. This applies also to cases that are taken to Vaasa on territorial grounds. This rather peculiar situation has a historical explanation: the predecessor of the Vaasa court in environmental matters was the Superior Water Court, which had expert judges, first water engineers and later also other technical and scientific experts. The Superior Water Court did not deal with matters concerning nature conservation whereas, on the contrary, the Water Act then regulated some matters now belonging to the scope of the EPA. When the Vaasa court was established this division between nature conservation matters and other 'environmental' ones was left untouched. Whether the situation is reasonable from today's perspective is naturally a question worth pondering: the scientific complexity in nature conservation cases is hardly less demanding than in cases dealing with the EPA or the Water Act.⁷⁰

The counterintuitive situation has naturally generated certain challenges. The marching order between the environmental permits according to the EPA or the Water Act on one hand and permits to exempt from the protection according to the NCA on the other has not been clear. These two types of permits can be applied for and issued independently and separately from each other, apart from two exceptions: the evaluation of consequences to Natura 2000 areas must precede the environmental permits, as must permits to derogate from protection of certain aquatic water habitats.⁷¹ In the absence of a definite rule, interpretations have varied, and the SAC has opted for a point of view that since the legislator has remained silent, no categorical stance on the matter can be taken.⁷² Often exemption from the NCA has not been on the agenda of undertakings requiring

⁶⁹ Administrative Judicial Procedure Act (hallintolainkäyttölaki 586/1996) 12.2 §. Legally non-binding English translation not consolidated since 2003 is available at <http://www.finlex.fi/fi/laki/kaannokset/1996/en19960586.pdf> (accessed 10 March 2018).

⁷⁰ Kuusiniemi (n 63) 329–30.

⁷¹ The NCA 65 § and the Water Act 2:11.2, the SAC 2006:7.

⁷² The SAC 2013:173, Vihervuori n (40) 513–6, and also KHO 2015:3 (votes 5–2) and KHO 2006:7. The theme is recently discussed in Soininen, Niko 'Luonnonsuojelluksen poikkeuslupa ja hankelupa välisestä edellytysuhteesta ympäristöoikeudessa' (2015) 4 Ympäristöjuridiikka 10-28; see also Belinskij, Antti 'Turvetuotanto oikeudellisessa murroskohdassa' in *Ympäristöpolitiikan ja -oikeuden vuosikirja 2015* (University of Eastern Finland 2015).

environmental permits.⁷³ When environmental permits are deliberated in the courts of appeal and court of final appeal, expert judges can have their say on how permit conditions (regarding e.g. location or time) should be amended for the project not to harm interests protected in the NCA. This possibility does not, however, assist in situations where environmental permits are not required at all and the decision does not proceed to the Vaasa court. In these cases the territorial administrative court can refer only to the standard mechanisms with which to acquire scientific information in all other matters falling within the jurisdiction of the administrative courts. These situations are examined in the following chapter. However, one must bear in mind that most often questions on Natura 2000 emerge in the permit procedures of the EPA or Water Act and while so, expert judges participate in dealing with the case.

4.3 Internal And External Sources Of Scientific Expertise

The broad scope of review and extensive interpretation of the principle of judicial investigation support reviewing the case as thoroughly as necessary. The expert members are not, however, the only source of scientific knowledge in the court, even when they would be part of the court's panel. The expert judges in the court panel participate in evaluation of the acquired material like the lawyer judges do but are also free to use all their own scientific expertise in the deliberation. As already noted, the materials with which the case is adjudged can originate from various sources: from the authority or court itself, the parties, or from external experts in the form of statements or expert opinions.

Administrative courts and, in some cases, administrative authorities can hear witnesses.⁷⁴ The parties can also refer to expert statements in their reasoning. These expert opinion providers are not called in evidence but their role is to equip the court with adequate scientific knowledge in the specific subject matter—in cases where in-house expert judges are not employed, these expert statements form the only source of expertise. The expert statements are to be differentiated from the so-called 'expert witness', a category of witness hearing where the witness is called in to give evidence in a matter they have observed and employed their specific expertise while doing so. The testimony they give could not be gathered from a layperson, hence the differentiation.⁷⁵ The legislation is not familiar

⁷³ Case KHO 2013:173.

⁷⁴ The EPA 207 §, the Water Act 11:15, the Administrative Procedure Act 38 § and the Administrative Judicial Procedure Act 40 §.

⁷⁵ Vuorenpää, Mikko *Asiantuntijatodistelun ongelmakohtia* (Talentum 2012) 39.

with these kinds of expert witnesses: the categorization has been developed in the literature.⁷⁶ Apart from hearing the witnesses the courts can *ex officio* obtain expert opinions if the case requires. Expert opinions can also be acquired in cases where an expert member or judge is part of the panel.⁷⁷ The reality of having in-house expertise readily at hand enables the court to better evaluate these external expert statements – acknowledgement of the challenges that the law/science interface poses to this facet was found highly relevant when developing the Indian NGTs.⁷⁸

The basic path to acquiring expertise is the statement procedure, which is justified by the obligations in the Administrative Judicial Procedure Act to thoroughly examine all aspects of the case. The substantial environmental legislation—including the EPA, the Water Act and the NCA—includes obligations for the administrative authority to inspect the matter, giving grounds for the statement procedure when found necessary. Statements can be obtained from e.g. a state supervisory authority with a territorial connection, or the authorities supervising public interest on the matter.⁷⁹ When the first instance administrative authority considers the matter, they have liberty to exploit all the official materials necessary. If the authorization is appealed, the impartiality and hearing of the parties must be strictly provided for if further statements are requested from authorities that did not give statements at the earlier stage. Also, the physical site of the (planned) undertaking can be observed during an on-site inspection, either by the first instance administrative authority or the appellate court.⁸⁰ Again in this procedural respect, the first instance administration and the judicial review of their activity are treated in a similar manner almost as if considered points on the same continuum.

Thus even though expert judges form an established part of the appellate authorities' work, their expertise is not the sole source of scientific knowledge in the court. Expert judges can be categorized as an 'internal' source of expertise, whereas the other mechanisms would be 'external'. Two mechanisms most likely complement each other: having an internal source of expertise readily at hand may enhance the likelihood of the court to be able to know when to pay closer attention to the

⁷⁶ Vuorenpää (n 75) 24.

⁷⁷ Administrative Judicial Procedure Act 40 §, Vuorenpää (n 75) 55.

⁷⁸ Gill (n 13) 183. Amirante does not explicitly discuss this aspect but contextualises the Indian NGT's with the global growth of green tribunals, a phenomena that exists partly due to this issue, Amirante (n 2) 446–8.

⁷⁹ The EPA 42 § and the Water Act 11:6.

⁸⁰ Regarding the first instance, the Administrative Procedure Act 38 § and regarding the appellate authorities The EPA 197.1 §, the Water Act 15:4.2, the Administrative Judicial Procedure Act 41 §. Even though possible, on-site inspections conducted by the SAC are rare.

scientific side of the case, or which questions to ask about it from the external sources of expertise.⁸¹ The benefit of having impartial scientific knowledge is also a noteworthy factor when multiple interests often seek to interfere with environmental decision-making, and where the courts may be overwhelmed by the task of assessing the environmental knowledge provided by ‘external’ scientific experts. This aspect was of central influence when India initiated the NGTs.⁸²

The principle of contradiction (or adversarial proceedings), however, adds an interesting twist in both the external and internal mechanisms with which the courts can or must expand their scientific understanding. According to the principle of contradiction, the parties must be reserved an opportunity to comment on the demands of others and the evidence potentially affecting the resolution of the matter.⁸³ This principle can be evaded in only minor issues, such as when the claim is dismissed without considering its merits or when it is immediately rejected.⁸⁴ Not only courts but also the first instance administrative authorities are bound by the principle.⁸⁵

The principle of contradiction causes no problems in cases when the parties themselves provide the courts with the information necessary for the decision-making, or if the information is acquired in the on-site inspections or (the infrequent) oral hearings. In environmental matters, especially when dealing with the EPA or the Water Act, the administrative authorities are under a broad obligation to communicate the pending matter not only to the parties and stakeholders but also to the general public.⁸⁶ Only rarely is the matter such that the public could not be informed—protection of business secrets or the exact location of a nature conservation site might constitute such—and even in these cases the information that is not under constraint must be disclosed.

However, when an expert member is part of the court panel, the parties are not separately informed of their stance. This could be seen as a disadvantage of the Finnish system: since the deliberation of the court panel takes place behind closed doors, the parties will never know how the scientific experts evaluated the subject matter and whether their evaluation had a decisive role in the

⁸¹ More on this at discussion, see text at fn(97)ff.

⁸² Gill (n 13) 177–180, 183 and the literature on the challenges of biased scientific knowledge and the risk of misuse of science in the law referred to in fn’s 16 and 21.

⁸³ The Administrative Judicial Procedure Act 34.1 §.

⁸⁴ The Administrative Judicial Procedure Act 34.2 §.

⁸⁵ The Administrative Procedure Act 34 §.

⁸⁶ The Water Act 11:10–11, the EPA 85 §. The latter includes an exception from the Publicity Act’s 16.3 § (The Act on the Openness of Government Activities, julkisuuslaki 621/1999) not to disclose the site of the planned undertaking.

reasoning—the said naturally applies also to the lawyer judges. Characteristic to this detail is the manner in which scientific and legal analysis are entwined in environmental reasoning: both the expert members and the lawyer members participate freely in the court’s deliberations, having liberty to have a say in whole of the matter, both legal and scientific questions included.⁸⁷ The work of the expert judge can hardly be dissected from the discussions – after all, in order to do so, the deliberation of administrative environmental matters should fall neatly into the categories of facts and norms, which it rarely does.⁸⁸ Even though the in-house expert judges are slightly problematic from the viewpoint of the contradictory principle, the solution opted for in Finland enables broad and knowledgeable examination of the matter and all its aspects.

5 EXPERTISE, IMPARTIALITY OF THE JUDGES, AND ALLOCATION OF THE CASES

The merging of scientific and judicial enquiry, the wide scope of review, and the broad interpretation of ‘legality’, put together, result in both the lawyer and expert judges having relatively free hands in their deliberations. Hence the significance of a fair trial, impartiality of the judges, and distribution of cases: the procedure within the courts can either hinder or encourage the successful performance of the given task. Thus these aspects are examined next.

The principles of fair trial, specified in the Court Act, require that the court itself distributes the cases to judges (and referendaries), with no external influence allowed. The criteria must be chosen in advance, be acceptable and clearly articulated, and must comply with the court’s regulation (also known as ‘standing orders’, referring to the court’s internal procedural guideline). However, the characteristics of each court, such as chamber divisions, grouping of cases and securing language rights (the country has two official languages and the obligation to secure indigenous groups’ language rights, namely the three Sámi languages spoken in its jurisdiction), may affect the

⁸⁷ The Union water law, namely the Water Framework Directive, is the prime example of the merging of scientific and legal evaluation in environmental regulation. The manner in which this occurs is explained in detail in Paloniitty, Tiina ‘Taking aims seriously—how legal ecology affects judicial decision-making’ (2015) *Journal of Human Rights and the Environment* 6(1), 55, 59–62. Of the more general question of the merging of scientific and judicial questions see fn (82) and text at it.

⁸⁸ Of the discussion on fact/norm dichotomy see e.g. Putnam, Hilary *The collapse of the fact/value dichotomy and other essays* (Harvard University Press 2002) 9, and of the benefits of retaining a distinction, not dichotomy, Del Mar, Maksymilian ‘Relational jurisprudence—Vulnerability between Fact and Value’ (2012) 2(2) *Law and Method* 63, 66–7, 69–71; Del Mar, Maksymilian ‘Legal fictions and legal change in the common law tradition’ in *Legal fictions in theory and practice* (Springer 2015) 225, 226 and of how this relates to environmental law, Paloniitty, Tiina *The (In)Compatibility Between Adaptive Management and Law—Regulating Agricultural Runoff in the EU* (Juvenes Print 2017), 98–101.

decisions. The overall rationale is to secure the individual's right to an impartial and neutral judge.⁸⁹ Issues of 'internal independence' can arise not only between judges of different court levels but also between different judges in the same court, or between judges and their presidents in the court.⁹⁰ Completely random allocation of the cases may increase the internal independence of the court but result in lack of effectiveness and efficacy.⁹¹ Thus allocation or assignment of cases and specialization of judges form a fragile balance. On the one hand the judges ought to be granted the chance to specialize in certain cases to develop their much-valued expertise, while on the other the allocation of cases ought to be non-partisan and justified by objective and general criteria—the parties should not have the right to pick and choose their judge.

International guidelines on the matter emphasize the same fair trial principles that apply in Finland: cases should be allocated with transparent and objective criteria. The UN General Council had a say on the matter in 1985, emphasizing the nature of allocation of cases as internal to the judicial administration.⁹² The Venice Commission, a subordinate commission of the European Council, had participants from various legal systems and questioned the relationship between objective allocation of cases and the special expertise a judge may possess. The Venice Committee recommends allocation to be random but simultaneously acknowledges that judges' specialisations may give grounds for different solutions, as long as the allocation criteria fulfil the general conditions and are decided upon in advance. Given that there is an exemption from this rule, it should be a reasoned and motivated one.⁹³ An inter-European comparison examining how the court rules on case allocation affect judicial integrity and impartiality found that, contrary to the hypothesis, the differentiation

⁸⁹ The Court Act 8:7, Government's Proposal for the Court Act (HE 7/2016), 81. The Finnish legislation on the matter follows the general fair trial guidelines as recommended by e.g. European Council in 2010.

⁹⁰ Mattila (n 19) 281, European Commission for Democracy Through Law (Venice Commission) 'Report on the Independence of the Judicial System Part I: The Independence of Judges' (16 March 2010 CDL-AD(2010)004) available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e)> (accessed 10 March 2018), paras 68 and 72.

⁹¹ Fabri, Marco and Langbroek, Phillip 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' 1(2) European Journal of Legal Studies, available at <<http://www.ejls.eu/2/31UK.htm>> (accessed 10 March 2018), 292, 308–9.

⁹² Basic Principles on the Independence of the Judiciary (UN General Assembly Resolutions 40/32, 29 November 1985 and 40/146 13 December 1985), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> (accessed 10 March 2018)

⁹³ The Venice Commission 2010 (n 60) paras 73 and 81. See also European Commission for the Efficiency of Justice, European judicial systems: efficiency and quality of justice (Council of Europe Publishing, 2012).

between jurisprudential and legalistic legal cultures played no significant role regarding the flexibility or rigidity of the allocation mechanisms in use.⁹⁴

Naturally, the expertise the Venice Committee had in mind was of the legal kind, becoming visible as legal competence, expertise and specialization. In the Finnish context, the same principles must be expanded to include expert judges as well. The limited number of expert judges, however, affects the allocation of cases, in both Vaasa and in the SAC. In Vaasa there are eight full-time and permanent expert judges and all three court chambers deal with environmental matters; in the SAC one of the four chambers deals with matters on land use and environment.⁹⁵ The new Court Act from 2017 resulted in redrawing the courts' regulation and the work resulted in communication on the issue—thus fairly recently the judges have had opportunities to ponder the subject of allocation.

The stance adopted in e.g. the SAC's memorandum is that there are no obstacles to allocating the cases based on the judges' expertise—judicial, scientific, or otherwise—as long as the criteria is chosen in advance.⁹⁶ In this regard the expert and lawyer judges must be treated similarly even if the type of their expertise would differ. It is indisputable that when expert judges are part of the court's panel the choice of judges is not as free and random as it would be were expert judges not used. That is a deficiency in the Finnish model. However, the system of in-house expert judges does not affect the other sides of the fair trial principle: the parties are not allowed to choose their judges and the allocation of the cases is otherwise as random as possible.

6 DISCUSSION

In her study on legal questions and scientific answers, Wahlberg explains how much in environmental regulation and legislation gets lost in translation. Due to the ontological differences between scientific and legal enquiry, the law drafters (and to some degree judges discerning environmental matters) are not always capable of asking the most relevant or accurate questions about the scientific realities that underpin the ecological or social phenomena that are to be

⁹⁴ The traditional typology was so futile that the researchers suggested abandoning it in future works on the theme. Courts from various countries were included in the study but Finland or Sweden were not included; Denmark represented the Scandinavian solution, Fabri and Langbroek (n 91) 299–300, 313.

⁹⁵ As noted in the beginning, not all cases considered 'environmental' go to Vaasa court; some go to territorial administrative courts, see text at fn(66)ff. The Vaasa court has also two temporary expert members. Generally on the Finnish administrative court system see Tegner Anker and others (n 14) 13–4, Fig. 3.

⁹⁶ Working Group Memorandum: Principles for allocation of cases in the Supreme Administrative Court, 27 October 2016 (Asioiden jakamisen perusteet korkeimmassa hallinto-oikeudessa. Työryhmän mietintö 27.10.2016). The communication is unpublished but distributed within the judiciary.

regulated. There are multiple reasons for this: due to their own constraints, scientists are (also) obliged to consider legally non-relevant factors in their studies; the courts do not adequately understand or employ statistical evidence; the very concepts of ‘probability’ or ‘causality’ are understood differently in the realms of science and law. On top of these more familiar considerations, the scientific information itself may have a limited ability to answer legal questions: ‘answers to scientific questions do not automatically serve as answers to legal questions,’ as Wahlberg summarizes.⁹⁷

The first and foremost beauty of the Finnish system is that the judges are not compelled to formulate and pose questions for the scientific experts to answer. When the judges’ panel deliberates the case, the scientific expertise is present in the discussion, formulating the case and the scientific realities it entails. Even when the panel decides to hear expert witnesses or gain expertise otherwise, the questions asked are formulated not only by the lawyer but also by the expert judges. The internalization of expertise in the Finnish administrative courts on most environmental matters elegantly solves one of the most fundamental problems of environmental regulation and litigation. In this specific regard the Finnish and Indian solutions are of equal value, as both have in-house expertise present in the court panel’s discussions. The Dutch option of having an external scientific unit (colloquially known as the StAB) providing answers to the judges’ questions underlines the importance of this matter: at times the scientific experts in the unit can guide the judges’ understanding of the factual side of the case and help them rephrase their queries.⁹⁸ When environmental matters are decided on in the Finnish administrative judicial system, facts and norms may become entangled during the decision-making, if such a holistic approach is needed to resolve the matter.⁹⁹

This emphasizes at the same time the frailties of the Finnish system – from this perspective not fulfilling the potential that the solution encompasses appears even more imprudent. The distinction between the cases dealing with the NCA only (with no reference to the Water Act or the EPA) and

⁹⁷ Wahlberg, Lena *Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations* (Lund University 2010) 14–6, available online at <<http://portal.research.lu.se/ws/files/5495800/3990729.pdf>> (accessed 10 March 2018). In its ontological part, Wahlberg’s work focuses on causalities: legally relevant relations, legally relevant causes and effects, where the manner in which environmental regulation orients to the future—asking prospective rather than retrospective questions—becomes crucial, *ibid* 27, 71.

⁹⁸ Gill (n 13). According to Backes, ‘[i]n complicated cases, the StAB can help the judges structure the factual aspects of the case and the relevant questions’ at fn 47 in Backes (n 15).

⁹⁹ See fn 82 and text at it.

the cases that deal with the last mentioned is unwise, if examined from the point of view of the scientific expertise present in the adjudication. The historical reasons behind the differentiation are naturally indisputable and justify the current state of affairs but the viewpoint adopted in this work does not support this solution. The greater the number of environmental cases taken to Vaasa, instead of the territorial administrative courts, the more extensive the benefit that the expert judges provide. These environmental cases are limited in number, also justifying centralization.

The notions of the contradictory principle, court deliberations and hearing must be assessed in this context. Even though the demands of the contradictory principle would not be as extensively fulfilled in the Finnish system as in other legal systems (be they national or international, e.g. the CJEU) it can be assessed that the benefits of the system outweigh these weaknesses in the arrangement.¹⁰⁰ The stances that expert judges take in court panels are not open to parties' evaluations or comments, rightfully prompting the concerns of equality of arms or right to adversarial procedure.¹⁰¹ However, it appears that in Finland there is an inclination to frame the issue quite differently: the expert judges' stances are not open to the parties but neither are the opinions of the lawyer members. From this perspective it is challenging to come up with convincing reasons for why the parties ought to have a say in the discussions that the judges hold during their closed deliberations, and in Finland 'judges' are here taken to mean any judge, irrespective of their educational background. It can be concluded that the benefits of this solution outweigh the problems the system might have with the contradictory principle, should there be any actual ones in the first place.

The flexibility with which the Finnish system allows for confluence of facts and norms during the decision-making, combined with the broad scope of review, comprehensive understanding of the principle of investigation, and independent position of the referendaries, exemplifies the characteristics of Finnish society as a trust society. Finland ranks high in overall trust in institutions and the legal system is among the most trusted.¹⁰² The way that most environmental matters are dealt with in Finnish administrative courts vests the judges with a broad margin of consideration. This solution enables sensible decisions when the experts – legal and scientific alike – are given enough leeway to tackle their task thoroughly and earnestly. The Finnish environmental administrative

¹⁰⁰ See the CJEU and the ECHR cases and literature referred to in fn 54 and text at it.

¹⁰¹ I.e. the concerns accounting for the case *Kress v France* App no 39594/98 (ECHR, 7 June 2001) could be presented also of the Finnish system.

¹⁰² The legal system comes second right after the police, Korhonen, Jouni and Nina Seppälä 'Finland: The strength of a high-trust society' in André Habisch and others (eds), *Corporate social responsibility across Europe* (Springer 2005) 13, 13–4.

judicial review has its closest cousin in the merits review conducted by the Australian environmental tribunal—however, the merits review is vested with greater leeway than is the case in Finland.¹⁰³ Interestingly, Cane claims that had the Australian merits review not been developed the judicial review would have developed towards broader understanding to occupy its space.¹⁰⁴ The manner in which the Finnish SAC has ceased to refer cases to the Council of State on the grounds of expediency consideration (use of discretion) may support this speculation.¹⁰⁵

From the comparative viewpoint, the solution may seem unconventional or peculiar, but within the nation it has not been opposed; on the contrary it has been considered a sensible arrangement that serves the needs of environmental adjudication well. Nonetheless these characteristics of wider Finnish society form the gravest obstacle to the in-house expert judge solution as an easily transferrable legal transplant for other jurisdictions to adopt, given that such an option was viable in the first place.¹⁰⁶ Simultaneously one must bear in mind that two nations with few common characteristics, Finland and India, both employ in-house expert members when environmental matters are dealt with in the (administrative) courts. The fact that India instigated its system only in this decade is a factor that other jurisdictions entertaining the need of a systemic amendment can take as an encouraging example.

¹⁰³ Ky (n 22) 213–7. Whether they are first cousins twice removed or second cousins once removed is left for specific analysis to discern. For the discussion of Australian system see also Fisher (n 9) 136.

¹⁰⁴ Cane, Peter ‘Merits and Judicial Review: The AAT as Trojan Horse’ (2000) 28 *Federal Law Review* 212, 243.

¹⁰⁵ See text at fn(24)ff.

¹⁰⁶ As Cohn states on an examination of legal transplants in the theme of this article, ‘no transplant is an island, and that complex modes of interaction color the process’, Cohn, Margit ‘Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom’ (2010) 58(3) *The American Journal of Comparative Law* 583, 583, 598; a critical stance on the whole concept of ‘legal transplant’ is offered in Özücü, Esin ‘Law as Transposition’ (2002) *International and Comparative Law Quarterly* 51(2) 205, 205.